U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-K-

DATE: MAY 30, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an advisor on security and non-proliferation of weapons of mass destruction, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, concluding that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Petitioner filed a subsequent motion to reopen, which the Director dismissed as untimely.

On appeal, the Petitioner submits additional documentation and a brief asserting that her motion was timely and that she is eligible for a national interest waiver under the *Dhanasar* framework.

Upon *de novo* review, we will remand the matter to the Director for further action and consideration.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> > (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> > (B) Waiver of job offer –
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> > > (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver if the petitioner meets the three prongs outlined in the decision.[2]

In order to properly file a motion to reopen, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the petitioner must file the motion within 30 days of the decision. If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of submission, but the date of actual receipt with the proper signature and the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

With respect to counting days for the purpose of calculating timeliness, the regulation at 8 C.F.R. § 1.2 provides:

> *Day*, when computing the period of time for taking any action provided in this chapter I including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period computed falls on a Saturday, Sunday, or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).
[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ANALYSIS

The Director issued the decision denying the petition on July 16, 2018, and properly gave notice to the Petitioner that she had 33 days to file a motion. USCIS received the Form I-290B, Notice of Appeal or Motion, on Monday, August 20, 2018, or 35 days after the decision was issued. The Director dismissed the motion to reopen as untimely.

Following the Director's dismissal of the motion, the Petitioner has filed an appeal. She contends, in part, that the motion to reopen was timely filed.

As cited above, the regulation at 8 C.F.R. § 1.2 states that when the "last day" of a period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. *Id.* With regard to the Petitioner's motion, the "last day" of the allotted filing period, August 18, 2018 (day 33), fell on a Saturday. She therefore was permitted until Monday, August 20, 2018, to file a timely motion. Accordingly, the Director erred in dismissing the motion to reopen as untimely.

Furthermore, because the Director did not consider the evidence and arguments the Petitoner submitted with the motion, we are remanding for the Director to analyze that documenation and make a determination as to whether the Petitioner has demonstrated eligibility for the benefit sought.

III. CONCLUSION

The record does not support the Director's finding that the Petitioner's motion was untimely. We are therefore remanding the motion for the Director to apply the *Dhanasar* analytical framework to make a determination as to whether the new facts and evidence provided with the motion establish that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision which, if adverse, shall be certified to us for review.

Cite as *Matter of A-K-*, ID# 3234293 (AAO May 30, 2019)